IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 65.

ASHBACKER RADIO CORPORATION, A Michigan Corporation,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

REPLY BRIEF FOR THE PETITIONER.

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This reply brief is filed because the Commission in its brief uses two new lines of argument (partially factual in character), suggested neither in the Court below nor in the brief in opposition to the petition for a writ of certiorari.

Neither argument accurately reflects existing facts.

In its brief the Commission, among other arguments, contends [1] that the construction permit given Fetzer is a conditional one and subject to action which may be taken

later as a result of the purported "hearing" to be granted Ashbacker (Br. 15, 20), and [2] that the sustaining by this Court of the Ashbacker contention would impose mechanical and procedural hardships upon the Commission (Br. 13, 20).

I. The grant to Fetzer was not a conditional grant but an absolute one and the Commission reserved no control over it.

The Commission argues that it has imposed conditions in the Fetzer construction permit and license which allow the Commission, in some unspecified way, to recall or "modify" the authorization so as to permit the grant of the Ashbacker application when "heard". This is not so.

When the Commission took its action on June 27, 1944, granting the Fetzer application without a hearing, it took that action unconditionally. It granted a construction permit in ordinary form.

Thereafter Ashbacker filed its request for "rehearing" which the Commission refused. In its refusal the Commission published an opinion arguing a legal philosophy. In that opinion the Commission expressed a view that the *statute* gave it a right to modify the Fetzer construction permit so as to permit the granting of the application of Ashbacker.

The Commission imposed no conditions, nor did it amend or change the construction permit. The Commission actually issued the formal construction permit July 18, 1944. The construction of Fetzer's station was expeditiously accomplished and a formal license for full and unrestricted operation was issued February 8, 1945, during the pendency of the present litigation.

The Commission never intended its discussion of its statutory authority on the Ashbacker petition to constitute a specific condition of the Fetzer grant. The Commission's opinion on Ashbacker's petition for rehearing says merely the following:

"At this hearing, petitioner will have ample opportunity to show that its operation as proposed will better serve the public interest than will the grant of the Fetzer application as authorized June 27, 1944. Such grant does not preclude the Commission, at a later date from taking any action which it may find will serve the public interest." (R. 13)

Under no circumstances can this be construed as a condition.

Moreover, it has never been suggested by or on behalf of the Commission that any ground has existed for the revocation of the Fetzer construction permit or the Fetzer license. Nor does anyone suggest any kind of modification that can be made. Until now no such modification has been specified and none can be, because, apparently, there is no frequency of the classification here involved which can be assigned to Fetzer. Otherwise this controversy would not have developed.

Nor is the Commission's position improved by the brief's frequent reference to Section 312(b) of the statute, providing that construction permits may, after appropriate order and hearing, be modified by the Commission. The argument is made (although no method is suggested) that the Fetzer license could be modified under this statutory authority.

This is an assumption that Section 312(b) is something that can be invoked by Ashbacker's application as a matter of course. In this regard the authors of the Commission's brief are not in accord with the Commission's rulings upon this subject.

Section 312(b) did not appear in the Radio Act of 1927. Pursuant to that Act the Radio Commission undertook upon a national basis a reallocation of the facilities of a number of stations. One of the stations affected was successful in enjoining the reallocation. As a result, the Commission sought legislation giving it power to initiate reallocations upon a national basis subject to subsequent hearing. It

was as a result of this that Section 312(b) appeared in the 1934 Communications Act.

The Commission outlined the history of this matter in its opinion published May 14, 1935, in *Petition of Universal Broadcasting Corporation*, etc., Docket 2830 (Mimeo. 12998).

That was a case wherein the Missionary Society of St. Paul the Apostle, having a pending application before the Commission, filed a petition asking the reassignment of seven stations so as to improve its own facilities, all pursuant to Section 312(b). In that case, notwithstanding that the petitioner had pending a *bona fide* application to improve its facilities the Commission flatly refused to invoke Section 312(b). It said:

> "It is our judgment that the authority conferred by this Section is important to the regulation of radio. Soon after the decision of the United States Court of Appeals for the District of Columbia in *Charles McK. Saltzman, et al.* v. *Stromberg Carlson Telephone Mfg. Co.*, 60 App. D. C. 31, the Federal Radio Commission urged the adoption by Congress of a provision similar to that now contained in Sec. 312(b). In the regulation of radio and the issuance of licenses for operation on a definitely limited number of frequencies or channels of communication, the exercise of authority such as conferred by Sec. 312(b) is necessary in order to maintain a national scheme of allocation. In the performance of this task the Section will prove beneficial. But in a case which, *upon its face*, does not appear to be materially different than other applications received and considered from time to time, we see no general public necessity for invoking the important authority conferred by the statute.
>
> "It is one thing for the Commission, standing in the relation of *parens patriae*, to negotiate a new allocation under authority expressly delegated by the Act; it is quite another for an individual station, having a personal pecuniary interest in requesting a reallocation involving a number of other stations, to shift the burden which it should bear in showing the necessity

for these changes to the stations to be affected. While any person or applicant may bring to the attention of the Commission such requests as may convince the Commission that a tentative order should be made in the public interest, modifying or changing the allocation to certain stations, and while the Commission may, on its own initiative and without such a suggestion so proceed, nevertheless, when the Commission does enter the order it represents the Commission's initiative and best judgment at the time. The Commission has tentatively spoken and made the statutory finding. The burden of convincing the Commission otherwise would then be upon the several stations affected. This procedure should not be adopted under circumstances such as presented in the instant case."

It is plain that something substantially more than the mere Ashbacker application will be required to induce the Commission to bring Fetzer before it under Section 312(b).

As a matter of fact, the section has never been invoked in the entire history of the Communications Act of 1934; none of the nine printed volumes of reports or the hundreds of mimeographed decisions of the Commission reveals any instance of the use of Section 312(b) in the manner suggested in the Commission's brief.

Fetzer's station is now operating under license as a going concern. The Ashbacker application cannot be granted so long as the Fetzer station exists. That existence cannot be terminated except by revocation. There are no grounds for revocation.

Fetzer's recognizes this and has pointed out its situation in the Court below (R. 29).

Notwithstanding anything contained in its brief, the Commission also recognizes this factual situation. The record shows that the Commission has specifically notified Ashbacker that its application will not be granted pursuant to any hearing unless Ashbacker can show that its proposed operation will not cause interference to Fetzer's existing station (R. 2-3).

Everyone agrees this cannot be done. The difficulty seems to be that the Commission's brief reveals an unwillingness to carry through from facts to conclusions.

The following language from the Commission's decision on Ashbacker's petition for "rehearing" is noteworthy: "Since a grant of the Fetzer application precluded a grant without hearing of the Ashbacker application (B2-P-3609) the Commission on the same day designated the latter application for hearing in accordance with Section 309(a) of the Act." It must be observed that it is the *grant* of the Fetzer application which does the precluding, not whether the grant was accomplished with or without hearing.

II. No administrative or mechanical inconvenience can result from sustaining the petitioner's contentions.

The Commission's brief argues that if the Commission is required to accord a comparative hearing upon simultaneously-considered competitive applications the Commission will be put to inconvenience. The brief makes the claim that the Commission would be handicapped in the handling of thousands of applications for broadcasting and other authorizations. This is naive. Reference is made in the brief to 1689 applications for standard broadcast stations in one year (p. 13). The fact is that most of these were applications for renewal of license or for authority to change equipment, concerning none of which has there been any controversy from competing applicants. Reference is also made to thousands of applications for aviation, police and other services (p. 13). These are almost unanimously non-competitive.

In the broadcast field the Commission has generally followed the practice of holding competitive hearings, pursuant to instructions it has several times received from the Court of Appeals, and has suffered no inconvenience. Even the current practice is to accord such hearing in the usual case. As recently as September 18, 1945, in *Mississippi Broadcasting Company, Inc.*, Docket 6659 (reprinted in the

Appendix) the Commission's opinion takes this practice for granted. No inconvenience has ever resulted and it has been possible to dispose of the hearing calendar as promptly as the Commission has wished.

As concerns nonbroadcasting services, the Commission has uniformly held hearings on competitive applications over the years. Cf. *Intercity Radio Telegraph Co.* v. *Federal Radio Commission*, 60 App. D. C. 21.

Some reference is made in the brief to impending developments in what is known as FM broadcasting and the argument is made that the requirement for holding hearings upon competing applications would impede the construction of some 2,000 FM stations during the next five years, particularly in such cities as New York and Philadelphia (p. 20). The Commission has impaired the validity of this argument by holding a hearing upon the New York assignments on Monday of this week. *Broadcasting and Broadcast Advertising*, October 15, 1945, p. 18.

It is true that action upon 2000 applications, without any hearing upon those which conflict, might afford some opportunity for unsupervised favoritism, but it is not true that holding hearings upon the few applications which are admittedly competitive is a procedure less to be preferred than that resorted to here. In the present case, the Commission's brief relies upon alleged facts taken from data submitted *in camera* after the Commission had in fact granted Fetzer's application.

The Commission justifies this procedure in its brief at pages 21-22 by saying:

> "The Commission is not an uninformed body, wholly dependent upon the data which may be supplied to it by applicants. On the contrary, as is well known, it possesses extensive knowledge of conditions in the broadcasting industry. By means of that knowledge and of the services of an expert staff, it is able to exercise an informed initial judgment upon applications. Its methods, therefore, provide assurance of fairness which may not be ignored and which justifies

> Commission action in numerous instances in which the testimonial processes of a hearing are not employed."

In fact the Commission's brief goes so far as to state:

> "Frequently the Commission is able to determine from examining an application that it is meritorious and from examining a competing application that *it is extremely unlikely to prevail . . .*." (Italics supplied.)

Restated, this is a blunt declaration that the Commission requires no help and wants no interference from the applicants upon whose rights the Commission is to pass. The Commission overlooks the fact that it is *not a source* of power but is expected to exercise a delegated power under constitutional and statutory safeguards, not the least of which is the requirement for fair and open hearings.

Nor is there any problem concerning what are referred to in the brief as "strike" applications. Presumably a "strike" application is an application filed without sincere purpose, merely to prevent action on the application of another. In an industry as closely regulated as broadcasting, the licensee would be rare indeed who would jeopardize his future existence through any type of insincere or improper application. Counsel recall no instance in all the published decisions of the Commission of any application handled by the Commission and identified as a "strike" application.

Respectfully submitted,

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APPENDIX.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.
Docket No. 6659
File No. B3-P-3612
In re Application of
MISSISSIPPI BROADCASTING COMPANY, INC. (NEW)
MACON, MISSISSIPPI
For Construction Permit

MEMORANDUM OPINION

By the Commission:

This is an application (filed May 8, 1944) of the Mississippi Broadcasting Company, Inc., for a construction permit for a new standard broadcast station at Macon, Mississippi, to operate on the frequency 1400 kc. with power of 250 watts, unlimited time, site to be determined.

The application as originally filed requested the frequency 1240 kc and **involved a question of possible interference with a conflicting application of Birney Imes, Jr., for a new station at Meridian, Miss., also requesting the frequency 1240 kc. The instant application was, therefore, designated for hearing, which was held in a consolidated proceeding** with the Imes application on November 17, 18, and December 1, 1944. Subsequently, the Mississippi Broadcasting Company, Inc., filed a motion to amend its application to request the use of the frequency 1400 kc (instead of 1240 kc) with power of 250 watts, unlimited time, and the removal of its application from the hearing docket; which motion was granted on January 23, 1945. Thereafter, on June 8, 1945, the applicant petitioned for immediate processing of its application, as amended, providing that the same be considered under the Commission's Supplemental Statement of Policy of January 25, 1945.

The operation of the proposed station on the frequency 1400 kc involves no questions **of interference** with any existing or **proposed broadcast stations.**

The applicant has submitted information indicating that all of the equipment necessary to effect the proposed construction and operation is available with the exception of a modulation monitor.

It appears that Macon, Mississippi, with a population of 2,261 persons (1940 U. S. Census) has no station at the present time. There is no primary service available to this community from existing stations during either the daytime or nighttime hours, nor to any of the proposed nighttime service area. Only a very slight amount of daytime service is available to the proposed daytime rural service area. This is rendered by Station WCBI, Columbus, Miss., 28 miles distant (operating on 1340 kc, 250 watts, unlimited time), affiliated with the Mutual Broadcasting System. Operating as proposed, the applicant estimates that it would render primary service to a nighttime population of approximately 2,820 persons and to a daytime population of 20,187 persons. The applicant represents that the proposed station would provide a wholly local program service without network affiliations. Statements from persons and organizations in Macon, Mississippi, which were submitted with the application, indicate that the proposed station is actively supported by representative community groups.

It appears from the foregoing that the application substantially meets the requirements of the Commission's January 25, 1945, Supplemental Statement of Policy. In its Statement of Policy of August 7, 1945, the Commission announced, among other things, that it would continue to act upon applications that have not heretofore been affected by the "freeze" policy, e.g., new stations in communities without primary service.

Upon consideration of the entire matter, the Commission finds that the granting of the application will serve public interest, convenience, and necessity.

IT IS THEREFORE ORDERED, This 18th day of September, 1945, that the application of the Mississippi Broadcasting Company, Inc., for construction permit BE, AND IT IS HEREBY, GRANTED, subject to the condition that the applicant will be required to install a modulation monitor of an approved type, as required by Section 3.55(b) of the Commission's Rules and Regulations, as soon as this product is available on the market.

T. J. SLOWIE,
Secretary.

(Emphasis supplied.)

ACKNOWLEDGMENT OF SERVICE.

Receipt is acknowledged of 5 copies of the Reply Brief for the Petitioner in No. 65, *Ashbacker Radio Corporation* v. *Federal Communications Commission*, this 18th day of October, 1945.

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Solicitor General of the United States.